IN THE MATTER OF THE HUMAN RIGHTS CODE, 1981
S.O. 1981, c. 53, As Amended

IN THE MATTER OF A COMPLAINT UNDER THE HUMAN RIGHTS CODE BY "A", COMPLAINANT WITH RESPECT TO DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF HARASSMENT AND SEXUAL ADVANCE BY RUBY'S FOOD SERVICES LTD. AND JOSEPH MEDEIROS. DATED NOVEMBER 23, 1989.

Place of Hearing:		Kingston, Ontario
Date of Hearing:		January 15 and 16, 1992
Board of Inquiry	-	Morley R. Gorsky
Appearances		
For the Commission	-	Anthony Griffin Counsel Legal Services Ontario Human Rights Commission
For the Complainant	-	The Complainant, in person
For the Respondent	-	Joseph Medeiros, in person

D E C I S I O N

At the commencement of the hearing Mr. Griffin advised me that the Compainant was seeking an order that her name not be published and that on behalf of the Commission he was supporting her request. Mr. Medeiros indicated that he was not objecting to such an order. Mr. Griffin informed me that he was aware of only one case under the Code in which such an order had been made. This was a decision of Dean Mercer in "B" v. Acton Restaurant and Mr. George and Mrs. Georgia Halis, dated November 8, 1989, unreported. In that case, acting under section 23 of the Statutory Powers Procedure Act, the Board of Inquiry made an order of non-publication of the complainant's name.

As Dean Mercer noted, at p.1:

> This of course is an unusual set of circumstances and indeed it may be virtually unprecedented in Human Rights proceedings. Under the circumstances of course the press will be entitled to report the nature of the proceeding in any event. We know that this is indeed a Human Rights proceeding involving discrimination on the basis of services and it is not, in my view, essential to the feature of publicity which is supposed to be the foundation of Human Rights proceedings that the complainant's name be identified or her circumstances be identified in order to fulfil the essential function which is to inform the public that these proceedings have in fact taken place and ultimately to describe the disposition of them.
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> Under the circumstances, and accepting that given the volatile nature of the illness itself, the volatile nature of the discussion and the public controversy surrounding it, given the potential for increasing the difficulty of the complainant and the complainant's family, I am willing to accede to the request for non-publication of the complainant's name and non-publication

> of any other identifying circumstances which would enable a member of the public to identify the complainant and I so direct the press in attendance, and indeed anyone else who becomes aware of these proceedings, that the complainant's name and identifying characteristics are not to be published.
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> I hasten to add that that does not indicate that I feel the press would be irresponsible in this case; it does not indicate that I feel that the press generally should be restrained. It is an exceptional order, in my view highly exceptional I make because of the particular circumstances of this case, and of course the press is free to remain and the press is free to report generally on the proceedings as they develop, so long as the order preventing publication or identification of the complainant is observed.
> (Emphasis added.)

Dean Mercer was dealing with what he described as: "an unusual set of circumstances" which "may be virtually unprecedented in Human Rights proceedings." He was dealing with a case involving AIDS. I was concerned that as the case before me is not based on an unusual set of circumstances, if I acceded to the request for non-publication I would be doing so in a situation which did not warrant the special consideration as existed in the case before Dean Mercer. Nevertheless, in the light of the support of the request by Commission counsel, there being no objection to the making of the order from Mr. Medeiros, nor from anyone else in attendance at the hearing, I make the order as requested. In doing so, I consider that Mr. Griffin had due regard for the public interest and other public considerations. The decision to grant the order is not intended as a departure from the principles enunciated by Dean Mercer.

This Board of Inquiry was appointed pursuant to the provisions of sub-section 37(1) of the Human Rights Code, 1981, S.O. 1981, c.53 (the "Code"), to decide the complaint of "A" alleging that her right to freedom from harassment in the workplace because of sex, and from sexual advance made by a person in authority had been violated in contravention of section 6(2), 6(3)(a) and 8 of the Code. The sections alleged to have been violated are as follows:

> 6.--(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
>
> (3) Every person has a right to be free from,
>
> (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; ... .
>
> 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

The alleged violations were said to have been committed by the respondents Ruby's Food Service Ltd. and Joe Medeiros, in the complaint dated August 19, 1989.

At the opening of the hearing, Commission counsel, advised that the proper corporate name should be Ruby's Food Services Ltd. However, he also indicated that the corporate respondent had been petitioned into bankruptcy on August 22, 1991, and that it was not

the intention of the Commission to proceed any further against that respondent. Commission counsel also informed me that he had discussed the consequences of the bankruptcy and the consequences of not proceeding against the corporate respondent with "A" and stated that she was in agreement that no remedy would be sought as against the corporate respondent. On the request of Commission counsel the complaint has been amended to remove the name of the corporate respondent, now bankrupt, from these proceedings.

The Complainant, "A", is 26 years of age. Her Complaint (Exhibit 2) alleges that from about February 13, 1989, she was employed as a bartender by the corporate respondent, which carried on a restaurant and bar business at 403 Princess Street in Kingston. The Respondent Joe Medeiros was one of the shareholders in the business and also had supervisory responsibilities at the restaurant over the employees including "A". Her Complaint alleges that Mr. Medeiros repeatedly made sexual advances toward her and also directed degrading and offensive remarks to her. He was said to have very frequently attempted to hug and kiss her even though it ought to have been apparent from her behaviour that his advances were most unwelcome.

"A" also alleged that Mr. Medeiros, from her perspective, "constantly" attempted to grab her hand and waist, and when she attempted to pull away, would try to maintain his hold on her. She alleged that the latter actions made her "feel sick and extremely

angry".

"A" also alleged that on one occasion, when she came to work five minutes before the commencement of her shift instead of twenty minutes, as was usually the case, Mr. Medeiros asked her in front of customers and staff: "What's wrong with you, did you get 'fucked' all night long?".

"A" alleged that she ignored Mr. Medeiros' vulgar comments although these embarrassed her, hoping that her evident distaste would cause him to "get the message."

"A" further alleged that she wished to retain her job as a bartender because she enjoyed its various aspects including interacting with clients and the other staff. She also stated that the "tips were good."

"A" alleged further that as a result of the above described actions of Mr. Medeiros, her enjoyment of the job could not surmount the increasing frustration brought about by his behaviour, which evidenced a "persistent lack of respect ... ." Among the various effects of the stress suffered by her was an inability to sleep at night.

"A" indicated that she was satisfied that Mr. Medeiros was aware that she found his "vulgar remarks offensive" and that she

"did not welcome any physical advances from him... ." She was of the view that his behaviour was intended "to provoke [her] in order to get some reaction from [her]."

She alleged further that she "was forced to quit on or about August 19, 1989," and her position is that she quit because of the acts of sexual harassment and the sexual advances made by Mr. Medeiros who was "a person in a position to confer, grant or deny a benefit or advancement to [her] where the person making the ... advance knows or ought reasonably to know that it is unwelcome ... ."

In her testimony at the hearing, "A" stated that she had a supervisor whose name was "Marilyn," whose surname she could not recall. Marilyn reported to Mr. Medeiros.

In her testimony "A" elaborated upon the statements contained in her complaint referring to instances where Mr. Medeiros had made comments with respect to her "chest", her "body appearance" and other parts of her body. (Transcript volume 1 p.17 line 3.)

She also recounted her recollection of Mr. Medeiros frequently saying things to her, which she found offensive, allegedly pertaining to her sex life. (Ibid. line 10.)

"A" indicated that she first tried to ignore Mr. Medeiros'

conduct (Transcript p.18 line 30), and then, when this did not appear to work, "started to have fights with [him] when he would act like this or say these things." (Transcript volume 1 p.18 line 31.)

When this tactic did not work she approached her manager, Marilyn, complaining about Mr. Medeiros' behaviour and she stated that she also had also spoken to one of the other owners, John Alves, to inform him about the situation. (Transcript volume 1 p.19 lines 4-11.) She obtained no satisfaction from either Marilyn or Mr. Alves, both of whom appear to have attempted to down-play what was taking place to try to induce "A" to ignore Mr. Medeiros' behaviour.

In addition, Mr. Medeiros was said to have made lewd comments about "A"'s body to friends of his who frequented the bar. Although some of the statements were made in Portuguese, which language she did not understand,she said that she concluded, based on the affect and body language of Mr. Medeiros, that lewd statements were being made about her body. (Transcript Volume 1 p.19 lines 29-31 and p.20 lines 2-12.)

In giving examples of statements made about her to customers by Mr. Medeiros, "A" stated that he would make statements such as: "Wouldn't you like to go and have sex with her?" (Transcript Volume 1 p.20 lines 25-30.)

"A" indicated that she was sickened as a result of having to hear these comments. (Transcript Volume 1 p.21 line 5.)

"A" also testified about an instance, referred to in the Complaint, where Mr. Medeiros said to her: "What were you doing, getting 'fucked' all night?" (Transcript Volume 1 p.21, lines 20-27.) She indicated that she found this behaviour "very degrading". (Transcript Vol.1 p.21 lines 30-31.)

"A" also testified as to instances where Mr. Medeiros touched her, referring to instances where, under the pretence of helping behind the bar (when his assistance was not needed), he would purposely push up against her and touch her. (Transcript Vol.1 p.22 lines 15-31 and p.23 lines 1-3.)

"A" also testified as to other instances when Mr. Medeiros touched her: "He would call you over to where he was drinking at the bar and he would reach over and he would touch your hand or he would try to touch you other places if he could." (Transcript Vol.1, p.23 lines 14-18.) She acknowledged that when the instances of harassment behind the bar took place: "... it was really hard for him to touch more than your hand really." (Transcript Vol.1 p.23 lines 18-20.)

The offensive and unwelcome touching by Mr. Medeiros was of "A"'s hands and waist. She could not recall his ever having

touched her breasts. (Transcript Vol.1 p.25 lines 27-31.) If Mr. Medeiros touched "A"'s breasts, she believed that it would be in the process of pressing against her, very likely when they were both behind the bar. She noted that "... he never physically touched me with his hands there." (Transcript Vol.1 p.26 lines 2-3.)

"A" did not recall that Mr. Medeiros had ever touched her legs with his hands (Transcript Vol.1 p.26 lines 4-6.)

"A" testified that Mr. Medeiros, on a number of occasions, tried to kiss her on the face and believes that he might have succeeded and recalled that he would hug her "as often as he could catch me off guard and be able to do this." (Transcript Vol.1 p.26 lines 20-28.) She indicated that his behaviour made her angry and she let Mr. Medeiros know that this was the case, in no uncertain terms: "Most of the time I would end up getting into great big explosive fights, verbal fights with him." (Transcript Vol.1 p.27 lines 6-11.)

"A" described a meeting which took place in the restaurant office approximately four months after she commenced work at Ruby's, involving herself, Marilyn and Mr. Medeiros. At that time, "A" informed Mr. Medeiros that although she enjoyed working at the restaurant, and wished to continue working there, his offensive behaviour had to stop in order that she could continue to do so.

It appears that Mr. Medeiros refused to take "A"'s complaints seriously and refused to alter his behaviour. From his perspective there was no problem. (Transcript Vol.1 p.31 lines 21-25.)

"A"'s complaints to Mr. Alves, which were made shortly after her meeting with Mr. Medeiros and Marilyn, were similarly ineffective, with Mr. Alves saying: "Well you know, that is the way that Joe is and you are just going to have to try to stay away from him." (Transcript Vol.1 p.32 lines 30-31 and p.33 lines 2-3.)

"A" also testified as to another example of Mr. Medeiros' behaviour when she had to go home because of illness and so advised Mr. Medeiros. Upon being informed of these facts, Mr. Medeiros said: "Well, what is your problem, have you been getting fucked all night?" (Transcript Vol.1 p.34 lines 2-11.)

Counsel for the Commission also called Alison Jane Gleeson to testify. Ms. Gleeson testified as to the incident, earlier testified to by "A", when certain offensive statements were made to her at a time when she had to go home early because of illness. Ms. Gleeson recalled the incident in the manner testified to by "A," and also testified as to the evident upset manifested by "A". (Transcript Vol.1 p.67 lines 29-32 and p.68 lines 2-3.)

Ms. Gleeson also testified about Mr. Medeiros' efforts, successful and otherwise, to grab hold of "A". (Transcript Vol.1

p.68.)

Ms. Gleeson indicated that Mr. Medeiros frequently attempted to touch employees and to put his arm around them. She indicated that she did not feel threatened by this behaviour as another employee had told her that there was nothing more intended by Mr. Medeiros. (Transcript Vol.1 p.69.) It appears that Ms. Gleeson was not entirely unaffected by Mr. Medeiros' behaviour as she did complain about it to Marilyn. (Transcript Vol.1 p.70 lines 11-13.)

In her evidence, Ms. Gleeson indicated that there was a difference in the way Mr. Medeiros treated "A" compared to the way he treated other employees, and she indicated that he appeared to be "fixated with her ... ." (Transcript Vol.1 p.71 lines 17-21.) She stated that: "He would sit there and stare at her and he seemed to be fixated with her. And he obviously bothered her a lot more than he bothered the rest of us, partly because she was working at the bar, and that's where he sat." (Transcript Vol.1 p.71 lines 18-32.) She went on to say: "... the rest of us, we had tables to serve and we could stay towards the back, it wasn't so bad." (Transcript Vol.1 p.72 lines 2-3.)

Mr. Medeiros viewed his behaviour as that of a good-natured employer: "Yes, shaking hands, you know, a pat on the back and stuff like that, but it was never intentionally for sexual ... ." (Transcript Vol.1 p.83 lines 28-31.)

It was Mr. Medeiros' belief that there had never been any criticism of his behaviour from employees on the grounds that it amounted to sexual harassment or represented sexual advances. He regarded "A"'s decision to terminate the employment relationship as being based on a "little argument that we had the day before" relating to her having criticized him for failing to purchase liquor required by the bar. (Transcript Vol.1 p.83 lines 5-18.)

Mr. Medeiros was of the view that his actions had been entirely misrepresented by "A" and Ms. Gleeson, and he regarded himself as a good employer who had treated his employees fairly. (Transcript Vol.1 p.84 and p.85.) I am satisfied that in Mr. Medeiros' mind, because he had no intention of going beyond the actions ascribed to him, he could not be guilty of sexual harassment or of making sexual advances: "I will say that I am not perfect. I do say that I may shake hands, touch, but not with intentions of going further than that." (Transcript Vol.1 p.88 lines 10-15.)

Mr. Medeiros regarded many of the episodes that offended "A" as "like joking things." (Transcript Vol.1 p.90 lines 9-10.)

Mr. Medeiros stated that some of the female employees patted him, which he regarded as inoffensive. He questioned why an employee would feel sexually harassed when he did the same thing as they were doing. (Transcript Vol.1 p.95 lines 3-9.)

In cross-examination, Mr. Medeiros admitted that he had touched "A"'s hands and that he might have touched her when they were "at the bar or something like that." (Transcript Vol.1 p.98 lines 31-32 and p.99 line 2.)

Mr. Medeiros denied that he was the kind of person who would sexually harass or make sexual advances to an employee and believed that "A" must have misinterpreted his otherwise innocent actions. On numerous occasions during his testimony, he said words similar to "... like I never grab her roughly, intentionally or with a dirty mind. Okay, they're saying whatever they put down on the paper about me, but like I said, I didn't do it intentionally, okay? I mean, when they rub when they come against me and they say I'm sorry too. How many times they wouldn't -- they came against me? Can you tell that that was accidentally or was that intentionally?" (Transcript Vol.1 p.102 lines 5-15.) I have some difficulty in accepting the protestations of Mr. Medeiros that he is not the kind of person to sexually harass employees or to make sexual advances to them.

Exhibit 6 is a transcript of the proceedings at trial in a prosecution in the Ontario Court (General Division) between Her Majesty the Queen against Mr. Medeiros. Mr. Medeiros stood charged that he did on or about February 7, 1991 at the city of Kingston sexually assault ["B"], contrary to section 271 of the Criminal Code to which he pleaded guilty. Count number 2 was that between

November 1, 1990 and February 3, 1991 Mr. Medeiros did commit a sexual assault upon ["C"] contrary to section 271(1) of the Criminal Code, to which indictment he also pleaded guilty. Through his counsel Mr. Medeiros agreed to the Crown's recitation of the evidence which involved two sexual assaults both involving employees of the restaurant where "A" had been employed. In the case of the first indictment, Mr. Medeiros leaned over and hugged the complainant without her consent, reached underneath her jacket, hugged her and kissed her on the lips and brushed his hands against her breasts. This conduct shocked the complainant. It is unnecessary to go further into reciting the actions of Mr. Medeiros except to state that, his protestations notwithstanding, he would appear to be the kind of person who would engage in the conduct that he now denies. The behaviour of Mr. Medeiros towards the complainant in the second count similarly belies his protestations. My findings with respect to the admitted facts in the criminal prosecutions only affects my view of Mr. Medeiros' credibility when he asserted that he was not the kind of person who would do the things ascribed to him by "A".

In Deep v Wood et al. (1983), 143 D.L.R. (3d) 246 (Ont. C.A.), the court said, at p.250:

> Evidence of good character in a civil action is ordinarily inadmissible since it is irrelevant in the determination of most issues arising in those cases. Nevertheless, cross-examination relating to general reputation for untruthfulness or to prior criminal convictions or to findings of professional misconduct involving dishonesty may be used to diminish the credibility of a witness. In contrast, the accused in a

criminal case may not be cross-examined as to his character unless he puts it in issue by adducing avidence of good character: see the Criminal Code, s.593; R. v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 at pp. 342-54. In regard to character evidence in civil matters, Sopinka and Lederman, op. cit., pp. 288-9, put it as follows:

> There are very few reported cases in which character evidence has been sought to be introduced by the examination of witnesses in chief. The vast majority of cases which deal with the use of character evidence as secondary evidence are cases where such evidence is attempted to be introduced by way of cross-examination. Here character evidence is admitted as part of a broader rule. On cross-examination, subject to the discretion of the trial judge to disallow any question which is vexatious or oppressive, a witness can be asked literally anything as a test of his credibility. This broader rule is subject to the qualification, however, that if the question is irrelevant to the facts in issue, but is asked purely for the purpose of testing credibility, the cross-examiner is bound by the answer. He cannot lead evidence to contradict the witness.
>
> In turn the rule precluding rebuttal evidence is subject to a number of exceptions. . . .

Here, Mr. Medeiros, in his evidence in chief, repeatedly stated that he was not the kind of person to sexually harass or make sexual advances towards an employee. Questions on the subject of his actions leading to his conviction could be asked to test his credibility and, given the issues before me, they were not irrelevant to the facts in issue. Also, unlike the case in Deep v. Wood et al., where the plaintiff was not found to have placed his medical reputation in issue, Mr. Medeiros, here, placed his reputation as a person who would not sexually harass or make sexual advances to an employee in issue. The cross-examination, utilizing

his convictions, was not intended to demonstrate that he was, because of the convictions, more likely to have violated the Code as alleged, but to test his credibility when he made his assertions as to the benign nature of his impugned conduct.

Having had an opportunity of observing and hearing "A", Ms. Gleeson and Mr. Medeiros when they gave evidence, and having reviewed their evidence, I have no difficulty in coming to the conclusion that "A"'s and Ms. Gleeson's recollections of the facts are by far the more accurate ones, and, I find that Mr. Medeiros breached "A"'s statutory right under Section 6(2) of the "Code" to be free from harassment in the workplace because of sex by the agent of her employer, and that Mr. Medeiros had also breached her rights under section 6(3)(a) of the "Code" as a person who had a right to be free from sexual advance "made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome... ." The evidence satisfies me that "A," by her actions and speech, made it abundantly clear to Mr. Medeiros that his advances were unwelcome and he ignored the clear message that he had been given.

Subsection 9(f) defines harassment as:

> "harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

In Cuff v. Gypsy Restaurant (1987), 8 C.H.R.R. D/3972 (Ont.Bd.

Inq.) at D/3981, the Board of Inquiry, Professor Bayefsky, stated:

> "Course" suggests that harassment will require more than one event. There must be some degree of repetition of the "vexatious comment or conduct" in order to constitute harassment.
>
> "Vexatious" is defined by the Concise Oxford Dictionary as "annoying" or "distressing"; the verb "to vex" is defined by The Standard College Dictionary as "to irritate", "annoy","trouble" or "agitate". The fact that the comment or conduct must be vexatious imports a subjective element into the definition of harassment; was the comment or conduct vexatious to this complainant? In considering this condition, account should be taken of the personality and the character of the complainant; a shy reserved person, or in some cases a younger less experienced or more vulnerable person, is less likely to manifest her annoyance, irritation or agitation with the respondent's behaviour than a self-confident, extroverted individual.

In Hall v. Sonap Canada, (1989), 10 C.H.R.R. D/6126, Chairperson Plaut applied "vexations" as follows [at D/6135 C.H.R.R.]:

> One has to look at the young, inexperienced and somewhat shy complainant who finds herself in a situation of innuendos and physical contact with a man who is older, is her boss and is in many ways socially and educationally much her superior. I have already indicated that I accept her [the complainant's] statement that she felt uncomfortable ... and for me that suffices to meet the test of this part of the phrase.

In dealing with the statements of Mr. Medeiros, that he did not know that his actions were unwelcome, I would refer to the case of Darlene Noffke v. McClaskin Hot House and Donald Carl McClaskin (1990), 11 C.H.R.R. D/407 (Zemans) where chairperson Zemans stated at D/409:

> The fourth criteria - "known or ought reasonably to have known" is more difficult to define. As Chairperson

> Bayefsky asks in Cuff, whose perspective governs? Victims are normally women in positions of relative weakness, while perpetrators are generally males in positions of relative power. Because of an ingrained history of gender oppression in the workplace, a certain level of oppression may be acceptable to those in control, and perhaps as well, to those who must acclimatize to it. While the precise nature of the test is not clear, it is certainly met if the victim makes it clear to the perpetrator that the behaviour is not welcome. In Cuff, Chairperson Bayefsky says at D/3981:
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> > Comment or conduct "that is known or ought reasonably to be known to be unwelcome" imports an objective element into the definition of harassment. The fact that this particular complainant found the behaviour vexatious is not sufficient. Respondents either must have known, or they ought reasonably to have known, the behaviour to be unwelcome...
> >
> > A complainant who clearly indicated to the respondent that his actions were unwelcome will more likely be able to satisfy the condition that the respondent knew the behaviour was unwelcome.
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> I would add that any clear indication that the behaviour is unwanted should satisfy the test of "ought reasonably to know," unless perhaps if the rejection is contradicted, to the extent that it is believable. It is clear that continuing willingness to work has no bearing on this test. Chairperson Shime established this in Bell, [Bell v. Ladas and Flaming Steer Steak House Inc. (1980), 1 C.H.R.R. D/155], at D/157:
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> > The willingness to work is of no moment because persons in need of employment may be prepared to endure certain humiliations because of their financial need.

I would note that Mr. Medeiros attempted to make something of the fact that "A" and Ms. Gleeson were sometimes tentative in their responses to questions and frequently prefaced their answers with such words as "probably." In reviewing the evidence, my findings of fact, as above recorded, deal with answers from the witnesses that were not at all tentative.

In addition, Mr. Medeiros endeavoured to rely on the fact that "A" appeared, to him, to willingly continue to work notwithstanding his behaviour. The above noted quotation from the Bell case, referred to in Noffke, is particularly apt in the circumstances of the case before me.

Notwithstanding Mr. Medeiros' protestations to the contrary, the evidence is clear that he breached the provisions of section 6(2) of the Code, his actions amounting to harassment in the workplace of the Complainant because of her sex, with Mr. Medeiros being an agent of the Complainant's employer. In addition, he breached the provisions of section 6(3)(a) of the Code, his conduct representing sexual advances by a person in a position to confer, grant or deny a benefit or advancement to the Complainant where he knew or ought reasonably to have know that his advances were unwelcome. Accordingly, he has breached the provisions of section 8 of the Code, as he was a person who infringed or acted in such a manner as to directly or indirectly do something that infringed the Complainant's rights under part 1 of the Code.

In addressing the subject of general damages, Mr. Griffin invited me to find that the Complainant had suffered two components of loss: firstly, a loss of dignity; and secondly a loss of right to be free from harassment. (Transcript Vol.2 p.52 lines 6-11.)

Mr. Griffin referred to a second checklist" appearing in

Noffke, at page D/414, where Professor Zemans quoted from an earlier decision of his, Graesser v. Porto (1983), 4 C.H.R.R. D/1569. Before enumerating a not exhaustive list to be used as a guide in establishing relevant factors [at D/1575], Professor Zemans, referring to the subject of general damages, stated:

> The case of Torres v. Royalty Kitchenware engages in a lengthy discussion of the scope and purpose of damages (pp. 24-42). What becomes apparent upon reading this passage is that in awarding damages, the trend has shifted from awarding such damages as a punitive measure, to awarding the damages as a form of compensation to the complainant. So too, has a principal emerged that the complainant, in addition to being entitled to damages based on specific damages such as lost earnings, is also entitled to general damages based on psychological damages, mental distress and the like.

The factors reviewed by Professor Zemans in the Graesser case are as follows:

> (a) The nature of the harassment, that is: was it simply verbal or physical as well;
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> (b) The degree of aggressiveness and the physical contact in the harassment;
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> (c) The ongoing nature, that is, the time period of the harassment;
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> (d) The frequency of the harassment;
>
> (e) The age of the victim;
>
> (f) The vulnerability of the victim;
>
> (g) The psychological impact of the harassment upon the victim.

On reviewing the factors set out by Professor Zemans and applying them to the facts of this case, Mr. Griffin stated (at Transcript Vol.2 p.53 lines 10-13):

> ...this is not the worst case of sexual harassment that has ever been before a Board of Inquiry. But that is not to belittle or to discount its impact upon "A".

I agree with Mr. Griffin that on an assessment of the evidence:

1. The harassment was both verbal and physical.

2. Without belittling or discounting the impact upon "A," this was not the worst case of sexual harassment that has ever been before a Board.

3. The period of harassment went on for a fair length of time.

4. That the acts of harassment were very frequent.

5. "A" was a young woman at the time of the incidents.

6. She was vulnerable, being half the age of Mr. Medeiros.

7. There was a noticeable psychological impact of the harassment on "A", her testimony being that she was first of all angry and also sickened, and the effects of the harassment at work impacted on her ability to concentrate at home and affected her ability to sleep.

I believe that Mr. Griffin's suggestion as to the amount of

general damages that ought to be awarded in this case ($1,000.00) is a fair one and is based on a realistic assessment of the evidence. (Transcript Vol.2 p.54 lines 20-21.)

I also agree with Mr. Griffin that such an award would not be, "so low as to be demeaning to "A"." (Transcript Vol.2 p.54 lines 29-30.)

Mr. Griffin also referred to art.40(1)(b) of the Code" which provides:

> Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceedings, the board, may ...
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, ...

Mr. Griffin, relying on the above subsection, requested that I direct Mr. Medeiros to make restitution. He relied on "A"'s evidence that on August 19, 1989 she left her employment as she was not able to take Mr. Medeiros' sexual harassment and sexual advances any longer. Mr. Griffin argued that "A" did not "sit around and do nothing that left the clock running." (Transcript Vol.2 p.50 lines 21-22.) As she was out of work for about three weeks she was said to have lost the income that she would have made in those three weeks: $440 of salary plus tips that she testified amounted to about $1,000 per month. (See transcript Vol. 2 pp.50-51.) Mr. Griffin argued that on the basis of the tips lost the

Complainant was entitled to approximately $750. (Transcript Vol.2 p.52 lines 4-5.)

"A" testified that there was a sharing scheme with respect to tips among waitresses, who gave back 10% of their tips to her. (Transcript Vol.1 p.35 lines 31-32, p.36 line 2.) Under this scheme, although "A" received 10% of the tips of the waitresses, she did not have to give them any part of tips paid to her. (Transcript Vol.1 p.36 lines 6-8.) She testified that the amount of the tips received by her varied depending on the shift worked, the day shift tips being considerably lower than the night shift tips. She did not maintain any written record of the amount of tips received and her evidence was based on her recollection. I did not receive any assistance from the evidence of Ms. Gleeson who was not questioned on the subject.

"A" described her efforts to find other work after she left her employment at the restaurant. She testified that she did not look for work in a bar, but that she did look for work in a restaurant as a waitress and that she also looked for work as an esthetician, the latter field being the one for which she had training. (Transcript Vol.1 p.38 lines 27-30, p.39 lines 2-14.) "A"'s evidence about her efforts in looking for other than work as an esthetician lacked certainty. I am satisfied that she decided to forego seeking employment in higher paying jobs, because she wanted to work as an esthetician.

Her stated reason for not seeking work in a bar was that she feared that taking another bar job might get her "into a situation like that" which led to the complaint. She said that as a result of work in the bar: "I had been kind of turned off." (Transcript Vol.1 p.38 lines 23-25.) As a matter of general contract law, the wronged party must "mitigate" its damages; that is, it must do what it reasonably can to minimize the losses. (See Cockburn v. Trusts and Guarantee Co. (1917), 55 S.C.R. 264. An employee entitled to damages because she has been unlawfully discharged or has left her employment because of a violation of her statutory rights, cannot remain idle and then expect complete compensation for the period. She must seek employment to mitigate the damages. The wronged party is entitled to receive damages compensating only the losses that could not have been avoided.

In the circumstances, "A" argued that it was not reasonable for her to seek work in a bar to mitigate her loss because of her concern that finding such work might lead to a repetition of the situation that she had recently encountered. Such an assertion is similar to a nurse, who, while at work, had been sexually harassed and been the subject of unwelcome sexual advances by a male doctor, and had therefore left her employment, subsequently refusing to seek work as a nurse because she was afraid that she would again encounter sexual harassment in a work setting where male doctors were present. There was no evidence to demonstrate that "A" had a realistic belief that working in a bar put her at risk of being the

subject of further sexual harassment and advances of the kind she had experienced when working at Ruby's. I do not have any evidence before me that she could not have secured employment in a bar if she had sought such employment. I am also not satisfied that she made any genuine effort to find employment other than as an esthetician.

As above noted, all that a person in the Complainant's position had to do was make reasonable efforts to reduce her loss. It is only fair to examine the entire evidence to see whether there has been a demonstration that insufficient efforts were made to obtain reasonable alternative employment. Here, the Complainant's decision was to focus her search for work on employment as an esthetician, where she knew that her initial income would be substantially less than it was when she worked in the bar.

While I have a good deal of sympathy for the Complainant and none for Mr. Medeiros, he was entitled to rely on the failure on the part of the Complainant to take reasonable steps to mitigate her loss. Confining her search for work to that as an esthetician, at a lower rate of pay, was not reasonable in the circumstances.

On the evidence, it is reasonable to conclude that it is unlikely that "A" would have been able to secure work for a period of a week, whether in a bar or elsewhere, and I am awarding her one week's loss of salary of $146.50.

Her claim for loss of tips was not supported by any documentary evidence. I might have been assisted in this regard by evidence furnished by "A's income tax return, however, she did not include the amount earned in tips in her return. Nevertheless, I am satisfied that she would have earned some amount in tips. In the absence of other than the "ball-park" figure of $1000 per month submitted by her, I award $200 for tips lost for the week for which for which "A" is to be compensated.

Mr. Griffin also requested that there be an award of interest from the end of August 1989 at the rate of 12½ percent per annum. He used as a guide the rate for pre-judgement interest rates for causes of action arising before October 23, 1989. Mr. Griffin's suggestion is well within the annual average referred to in the Ontario Gazette table. Interest as requested is awarded on the amounts awarded for general damages and restitution.

Dated at Toronto this 12th day of February, 1992.

M. R. Gorsky - Board of Inquiry